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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. CR-19-00898-PHX-DLR(DMF)

**DEFENDANT’S SEVENTH
MOTION IN LIMINE: TO
PRECLUDE GOVERNMENT’S
USE OF THE WORDS “VICTIM”
AND “WITNESS TAMPERING”
OR “OBSTRUCTING JUSTICE.”**

Pursuant to Federal Rule of Evidence 403, Defendant David Harbour moves *in limine* to preclude the government from using the word “victim” to describe any individuals identified in the superseding indictment (“SSI”) or any other individuals that may have invested with or loaned money to Mr. Harbour or any of his entities. We also seek to preclude the government from using the words witness tampering and obstruction of justice with respect to civil settlements reached with certain so-called victims.

I. BACKGROUND AND ARGUMENT

The government alleges that, over a period of about ten years, Mr. Harbour defrauded investor-victims out of approximately \$4,382,864.01 by promoting and selling fraudulent high-yield investments known as payday loans. [Doc. 154 at 2:5-9.] Mr.

1 Harbour allegedly induced the investor-victims to provide funds by making materially
2 false statements and omissions. [Doc. 154 at 2:9-10.]

3 The government and its witnesses should be barred from using the term “victim”
4 and “investor-victim” in the presence of the jury. Using the term would violate Fed. R.
5 Evid. 403, invade the province of the jury to decide whether there is, in fact, a victim,
6 presuppose facts not in evidence, and deprive Mr. Harbour of a fair trial. The issue at trial
7 is whether a crime has been committed – and therefore, whether there is a victim. *See State*
8 *v. Cortes*, 851 A.2d 1230, 1239-40 (Conn. App. Ct. 2004), *aff’d*, 885 A.2d 153 (Conn.
9 2005) (holding that jury charges using the term “victim” instead of “alleged victim”
10 violated a defendant’s due process right to a fair trial); *Talkington v. State*, 682 S.W.2d
11 674, 674 (Tex. App. 1984) (use of the term “victim” in court’s rape charge was reversible
12 error when the issue at trial was whether complainant consented to sexual intercourse);
13 *People v. Davis*, 423 N.Y.S.2d 229, 230 (N.Y. App. Div. 1979) (“By referring in its charge
14 to the complainant as the ‘victim’ and to the defendant as the ‘perpetrator,’ the court
15 impermissibly insinuated to the jury that the complainant was the victim of injuries
16 resulting from acts committed by the defendant.”).

17 This situation contrasts, for example, a murder case where the murdered individual
18 is a victim because a crime has already been determined to exist. Then, the issue is whether
19 the defendant committed the crime. Here the jury has the responsibility of deciding
20 whether a crime even occurred and whether that crime resulted in harm to certain
21 individuals. To label those individuals “victims” at the outset of the trial carries the risk of
22 improperly influencing the jury’s decision, and would presuppose that Mr. Harbour
23 already committed the crimes for which he is actively on trial. This would be premature
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1 and prejudicial.

2 The prejudice described above resulting from use of the “victim” label at trial
3 substantially outweighs any probative value of the term. Fed. R. Evid. 403. Using the term
4 “victim” presupposes that Mr. Harbour committed a crime against the named individuals
5 and paints him as a criminal in front of the jury before a fair trial has been completed.
6 There is virtually no probative value in allowing the government to use the term “victim”
7 to describe the individuals in the SSI. *See United States v. Ehrens*, No. CR-15-200-C, 2015
8 WL 7758544, at *2 (W.D. Okla. Dec. 1, 2015) (considering a similar motion and finding
9 that there was “no need by any party to refer to [the alleged victim] by any particular
10 descriptor other than her name”). Restricting the use of the term “victim” does not prevent
11 the government from describing the harms allegedly suffered by the individuals in this
12 case, or from presenting any of its other evidence. The government and its witnesses would
13 remain free to refer to individuals by name, initials, or by other descriptive terms.

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17 R.G. is one of the “Group of Six,” a so-called investor-victim. Her proposed
18 evidence is discussed in MIL Number 1 which seeks to exclude all victim-witness
19 evidence because it is not part of any of the charged conduct. If that evidence is ruled
20 inadmissible, it would moot the part of this MIL that discusses her.

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22 With respect to the phrases witness tampering and obstruction of justice, two parts
23 of this Court, you and Magistrate Judge Fine, have already found that there was no
24 probable cause to believe that Harbour had engaged in witness tampering or obstruction
25 of justice with respect to settlement agreements reached with Rich Turasky and Allison
26 Wilson and sought but not reached with Carol Hill and Mark Burg. If the government used
27 those phrases the Court will be asked to instruct the jury that, as a matter of law, this Court
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1 has already determined that those civil settlement negotiations did not constitute an
2 attempt either to tamper with a witness or obstruct justice. We are not arguing that evidence
3 of the settlement discussions and agreements be excluded under Rule 408, Fed. R. Evid.,
4 but will ask for a jury instruction with respect to the limitations on the use of settlement
5 discussions and documents. The agreements and proposed agreements, themselves,
6 contain limiting language (“no admissions”).
7

8 **II. CONCLUSION**

9 For the reasons above, Mr. Harbour respectfully requests an order precluding the
10 government and its witnesses from using the terms “victim”, witness tampering, or
11 obstructing justice in the presence of the jury.
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13 RESPECTFULLY SUBMITTED this 20th day of December 2022.
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15 CHRISTIAN DICHTER & SLUGA, P.C.

16
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23 **CERTIFICATE OF SERVICE**

24 I hereby certify that on December 20, 2022 I electronically transmitted the attached
25 document to the Clerk’s Office using the CM/ECF system for filing and for transmittal
26 of Notice of Electronic Filing to the following CM/ECF registrants:

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4 /s/ Yvonne Canez